STATE OF MICHIGAN

COURT OF APPEALS

AUTO CLUB GROUP INSURANCE COMPANY, Plaintiff-Appellant,	UNPUBLISHED May 23, 2006
v	No. 266517 Grand Traverse Circuit Court
GARY LEIRSTEIN and CHESTER WILSON, Defendants-Appellees.	LC No. 05-24456-NZ

Before: Sawyer, P.J., and Kelly and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right an order denying it summary disposition pursuant to MCR 2.116(C)(10) and granting it to defendants. The order determined that plaintiff's insurance policy covered a hunting accident in which defendant Leirstein accidentally shot defendant Wilson, who commenced a separate negligence suit against Leirstein.[1] We affirm.

Leirstein, Wilson, and others own a parcel of partially wooded property that they have used for hunting on a continuous basis for more than twenty years. During that time, they had erected various hunting blinds, and they had a policy of using two-way radios to keep each other appraised of their respective locations on the property while hunting. They erected elevated tripod hunting stands shortly before the day of the accident, and Leirstein used one of them for the first time that day. Wilson was located in his hunting blind, which was not visible from the tripod. When a deer emerged from a line of trees, Leirstein contemplated whether he wanted to shoot it, but ultimately decided that he wanted venison, the deer was an easy shot, and that it might wander into Wilson's line of fire. He was using a highly accurate gun and scope. However, when he fired, the bullet did not strike the deer, but instead went through Wilson's blind and into a tree behind it, passing through Wilson's ankle along the way. There is no dispute that Leirstein was ultimately mistaken about the blind's location, but subsequent examination of the bullet holes suggested that the bullet might have ricocheted off something and taken an indirect path to the blind. Wilson made a claim for damages with plaintiff, Leirstein's insurer, and filed a separate suit against Leirstein alleging negligence. Plaintiff argued in the

[1] The other suit is not at issue in this appeal.

trial court, as it argues on appeal, that summary disposition in its favor is mandated by the facts and by its insurance policy, which contains a "criminal act" exception. Plaintiff relies on MCL 752.861.

We review a grant or denial of summary disposition de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, we consider all evidence submitted by the parties in the light most favorable to the non-moving party and grant summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*., 120. We likewise review de novo questions of statutory construction, with the fundamental goal of giving effect to the intent of the Legislature. *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 347; 656 NW2d 175, amended on other grounds 468 Mich 1216 (2003). We review de novo as a question of law the proper interpretation of a contract, including a trial court's determination whether contract language is ambiguous. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). A true ambiguity in the contract will be construed in favor of the insured, but clear and precise terms must be enforced as they are written. *Henderson v State Farm Fire and Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999).

The present case is in a sense derivative of an underlying suit between defendants, wherein Wilson alleges that Leirstein was negligent and careless in discharging his gun "where [Wilson] might suffer injury," proximately causing Wilson's injury. The present suit is, as the trial court succinctly noted, a "declaratory judgment action seeking an order holding that [plaintiff] need not provide Defendant Leirstein with a defense and need not provide coverage." Plaintiff's insurance policy unambiguously excludes from coverage injuries resulting from criminal acts, irrespective of whether the actor was charged or convicted.[2] Thus, plaintiff relies on MCL 752.861, which states as follows:

> Any person who, because of carelessness, recklessness or negligence, but not willfully or wantonly, shall cause or allow any firearm under his immediate control, to be discharged so as to kill or injure another person, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison for not more than 2 years, or by a fine of not more than $2,000.00, or by imprisonment in the county jail for not more than 1 year, in the discretion of the court.

Plaintiff's theory is that, if Wilson prevailed in his suit against Leirstein, Leirstein's negligent discharge of his gun would constitute a misdemeanor, which would then be excluded from coverage by the plain language of the insurance policy.

However, our Supreme Court has explained that where "the uncontested facts adduced at trial established that the firing of the weapon by the defendant was intentional," the "defendant's conduct did not fall within the scope of the conduct prohibited by" MCL 752.861. *People v Cummings*, 458 Mich 877; 585 NW2d 299 (1998). In other words, MCL 752.861 does not apply

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[2] Leirstein was not charged with any crime in connection with the facts underlying this case.

if the discharge itself was not carelessly, recklessly, or negligently caused. There is no dispute here that Leirstein fired his rifle deliberately, intentionally, and, indeed, after some careful consideration. Leirstein's shooting of Wilson was not a criminal act within the meaning of MCL 752.861, irrespective of whether Leirstein otherwise acted negligently and caused Wilson's injury thereby. Therefore, the criminal act exclusion does not apply. Plaintiff does not suggest that any other crime was committed.

Plaintiff also disputes that the shooting was covered by the policy as a general matter. The policy covers bodily injury caused by an "occurrence," which is defined as an "accident," which is defined as "a fortuitous event or chance happening that is neither reasonably anticipated nor reasonably foreseen from the standpoint of both any insured person and any person suffering injury or damages as a result." Plaintiff contends that the injury was reasonably forseeable and therefore not covered. Plaintiff correctly argues that this is an objective standard, as required by the use of the word "reasonably." *Frankenmuth Mut Ins Co v Masters*, 225 Mich App 51, 63; 570 NW2d 134 (1997), rev'd on other grounds 460 Mich 105 (1999). "A result is reasonably foreseeable if there are indications which would lead a reasonably prudent man to know that the particular results could follow from his acts." *Allstate Ins Co v Freeman*, 432 Mich 656, 675; 443 NW2d 734 (1989), quoting *City of Carter Lake v Aetna Cas & Surety Co*, 604 F2d 1052, 1059 n 4 (CA 8, 1979).

Guns must reasonably be known to be dangerous, and hunting accidents must reasonably be known to be inevitable, but that does not address whether *this particular* accident would predictably happen under *these particular* circumstances. This does not demand omniscient awareness of all of the facts. Although there was no binding majority opinion in the case, *Allstate Ins Co v McCarn* (*After Remand*), 471 Mich 283; 683 NW2d 656 (2004), is instructive. The lead opinion stated that the question is whether "a reasonable person, possessed of the totality of the facts possessed by [the insured], would have expected the resulting injury." *Id*., 290. Although not binding, it is entirely consistent with earlier case law. See *Paulen v Shinnick*, 291 Mich 288, 291; 289 NW 162 (1939) (noting in the context of a hospital that reasonable care "does not demand omniscience"). In any event, three other justices in that case also agreed that the standard was not omniscience, but "what a reasonable person would have believed . . . after examining all of the pertinent information available to the insured." *McCarn*, *supra* at 301-302. The relevant difference between the two opinions was whether the insured's beliefs constituted objective "facts."

The rational consequence of either standard is that Leirstein's mistake as to the location of Wilson's blind is not relevant. There is no dispute that Leirstein genuinely believed the blind was in a different location. It was impossible for him to see otherwise, the group of hunters took safety seriously, they appraised each other of their respective whereabouts, and they were familiar enough with the area and with Wilson's blind for Leirstein's belief to be objectively reasonable. Under either interpretation of the standard as set forth in *McCarn*, Leirstein merely made an objectively reasonable mistake.

In the context of negligence, "the general rule [is] that negligence cannot be presumed from the fact of the injury." *Redmond v Delta Lumber Co*, 96 Mich 545, 547; 55 NW 1004 (1893). Analogously, the fact that Leirstein made a mistake does not prove that the correct course of action was objectively apparent to a reasonable person. Furthermore, Leirstein was using a high-quality and high-accuracy gun and scope, he was shooting at a downward angle

with ground as a backing, and the deer was in his scope's crosshairs. Although everyone was generally aware that there were many rocks on the property, no one was specifically aware of any in the vicinity of the deer. The record shows that Wilson or Leirstein had no facts available to them at the time of the accident that would have caused a reasonable person to anticipate that Wilson would be injured when Leirstein shot at the deer. Thus, the accident was within the insurance policy's general coverage.

Affirmed.

/s/ David H. Sawyer
/s/ Kirsten Frank Kelly
/s/ Alton T. Davis